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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 158 (with Nos. 159, 160, 161, 162).

The Southern Pacific Company, the Atchison Topeka and Santa Fe Railway Company, the Santa Fe Pacific Railroad Company, and the Southern California Railway Company,

Appellants,

vs.

The Interstate Commerce Commission.

BRIEF FOR APPELLEE.

STATEMENT.

Object of Suit.

The purpose of this bill in equity [R. 8-84] brought by the Interstate Commerce Commission against the Southern Pacific Company, the Atchison, Topeka and Santa Fe Railway Company, and its constituent corporations, is to enjoin the defendants, common carriers

engaged in interstate commerce, from violating and refusing to obey an order made by the Interstate Commerce Commission, requiring them to cease and desist from enforcing a rule and practice established by them on January 1, 1900, in and by which they, as initial carriers, assumed the absolute and unqualified right of *routing shipments of citrus fruits over lines of railway connecting with the lines of defendant, they all being established routes* designated and laid down in the joint tariffs filed with the Interstate Commerce Commission by the defendants and their eastern connecting lines. [R. 83, 84.]

The Atchison, Topeka and Santa Fe Railroad Company, and the Southern Pacific Company, defendants, own, operate or control the only lines of railroad from Southern California to the east, connecting with lines in eastern states and in Canada, excepting a line called the "Salt Lake Railroad", put in operation since the trial of this cause in the Circuit Court, which operates a line of railroad running over the Atchison rails from San Bernardino to Barstow, and thence over other lines to Salt Lake City.

The Interstate Commerce Commission, in its findings and report, upon which this suit is based, and which findings will be more specifically hereinafter referred to and reviewed, show in substance:

(1) That prior to the year 1900, shippers of citrus fruit generally exercised the control of their freight over lines of railroad connecting with the defendants' railroads, and in pursuance of a universal practice they exercised the right of diverting cars to different points,

after leaving the place of shipment, and that this practice of diversion was necessary to the control, protection and sale of the fruit.

(2) That prior to the year 1900 there was active competition between the defendant railroads, and the published and official tariffs were cut by the payment of rebates.

(3) That a combination or arrangement was formed about the year 1900 between the two systems of railroad, to equally divide the orange freight traffic out of California, and also to divide the entire volume of freight over connecting lines of these two systems by certain percentages, and that the freight was so divided by those lines between the initial lines, and their connections from January, 1900, down to the trial of this cause.

(4) That the rule and practice of the defendants, reserving control over the routing of freight over connecting lines, which lines are laid down in the tariffs of the defendant railroads on file with the Commission, is in violation of the statute in refusing shipments over designated routes, at the tariff rates, and is also discriminating in its effects, as to commodities, shippers and localities, and that such rule or practice was put into effect in order to effectuate a traffic pool and division of freight over connecting lines, and to destroy competition.

The order of the Commission to the defendants to desist from enforcing the routing rule was disobeyed and thereupon this bill was filed.

Proceedings in Circuit Court.

The defendants filed demurrers to the bill for want of equity and for non-joinder of parties defendant. These were overruled. [R. 91.]

The court sustained its ruling upon the demurrers by an opinion. [R. 1017, 1024; 123 Fed. R. 597.] Answers to the merits were then filed and testimony taken upon the merits.

It was stipulated between counsel that either party might introduce in evidence subject to objection, any part of the testimony taken before the Interstate Commerce Commission in the cases out of which this cause arose entitled Consolidated Fordwarding Company and Southern California Fruit Exchange v. Southern Pacific Company, *et al.*, numbers 575 and 576. [R. 146, 147.] Both parties introduced parts of such testimony, but as it was very voluminous, only a small portion of the whole was presented. Further original testimony was taken by both sides in the Circuit Court.

Upon final hearing the Circuit Court directed a decree in favor of the complainant enjoining defendants from violating the order of the Commission. [R. 111-113.]

The court below supported its decree upon final hearing by an opinion. [R. 1024-1047, also 132 Fed. R. 829.]

Appeals were taken by defendants directly to this court under the provisions of section 2 of the Act of February 11, 1903, and section 3 of the Act of February 19, 1903.

See I. C. C. v. Baird, 194 U. S. 25, 35.

The defendants at the time of their appeal to this court sought to secure an order of the Circuit Court superseding the operation of the decree pending such appeal, which was denied. [R. 1063.] The Circuit Court also filed an opinion upon the application of the defendants for a supersedeas. [137 Fed. R. 606.]

Railway Systems of Appellants and Situation of Orange Industry.

The Southern Pacific Company, at the time these proceedings were commenced, was, and still is, operating a line of railroad from Los Angeles, California, easterly to Galveston and New Orleans, connecting with numerous lines to the north and east; and also a line from Los Angeles northerly to San Francisco, and from thence east to Ogden, Utah, there connecting with the Union Pacific Railroad; and also a line from San Francisco northerly to Portland, Oregon, there connecting with railroads running to the eastern states.

The Atchison, Topeka and Santa Fe Railway Company and its constituent companies were then and still are operating a railroad from Los Angeles to Chicago, connecting in various states and territories and at Chicago with other lines of railway running to all parts of the United States; and also a line of railroad from Los Angeles northerly to San Francisco, there connecting with other lines running into various parts of the United States.

These two systems of railways have numerous lines running from Los Angeles to various nearby points upon the Pacific coast, connecting there with wharves, among

others Port Los Angeles, Redondo, San Pedro and San Diego.

These two railway systems control and operate all of the lines of railroad from Southern California to points on and east of the Missouri river.

The findings of fact of the Interstate Commerce Commission upon the subject of market prices, mileage and rates, in evidence in the present case, are in part as follows:

> "A car of oranges is stated to sell in the eastern markets for as high as $1,000 and sometimes as low as $300. * * * *
>
> 11. The blanket rate of $1.25 per 100 pounds amounts to 90 cents per box of oranges on an estimated weight of 72 pounds. The actual weight of a box of oranges is about 78 pounds. A car-load of oranges containing 26,000 pounds, the minimum car-load weight, gives the carriers a total revenue of $325 per car. Add to this the icing charge which is $60 to Kansas City, $75 to Chicago, and $90 to New York, and the total charge paid by the shippers amounts to $385 to Kansas City, $400 to Chicago and $415 to New York. The following table shows the rates per ton per mile resulting from these charges from Redlands, Cal., to Kansas City, Chicago and New York, via the short lines, the Santa Fe and its connections:

From Redlands, Cal., to	Distance. Miles.	Rates per ton per mile from transportation charges only. Cents.	Rates per ton per mile, including icing and transportation charges Cents.
Kansas City	1,758	1.422	1.684
Chicago	2,216	1.128	1.388
New York	3,129	.799	1.02

> The average rate per ton per mile upon all freight for all roads in the United States during the year ending June 30, 1900, was .729 of a cent." [R. 69, 70.]

The average haul for oranges was 2500 hundred miles, and the average railway tariff was therefore about one cent per ton a mile, although the freight was handled in car-load lots and often in train loads.

The average haul for all freight in the United States is only 240 miles [Statistics of Rys. I. C. C. Rep. 1902, page 64] which rate *per ton mile* is usually reduced as the distance which the freight is hauled is increased, and the tariff rate is usually reduced also as the volume of freight is increased.

The shippers of citrus fruit were therefore paying about thirty per cent. more *per ton mile* for freight shipped in car-load and train load lots 2500 miles, than the average shippers of the country were paying for freight of all classes shipped an average distance of 240 miles.

While this was the situation of orange growers their burdens were enormously increased by the routing rule complained of.

The supplemental report of the Interstate Commerce Commission, in the proceeding before the Commission out of which this case arose, which supplemental report is not in evidence here, but which it is assumed the court may take judicial notice of as being an act of an important bureau of the Executive Department, contains the following:

> "The average yield of an orange grove is about 200 boxes per acre and upon this basis the investment cost is 35 cents per box. The cost per box of oranges for cultivation, irrigation, fertilizing, picking, sorting, packing, boxing, hauling and selling is about 75 cents per box. *The total cost to the grower is therefore, on the average about $1.10 per box.* Compared with the free on board prices in

California *the grower made 30 cents a box in 1901-1902 and lost 10 cents a box in 1902-1903.* On the other hand, the price of oranges per box in the east in the latter year ranged from $1.75, when the market was glutted, to $3 for the best grade during the Christmas holidays. *The average price in the east that season was approximately $2.20 per box.* The rate of $1.25 per hundred pounds is equal to 90 cents per standard box of 72 pounds. This added to the above estimated cost of $1.10 for production and placing on board cars makes a total of $2 per box. This does not include the cost of refrigeration in transit. The testimony, though by no means uniform as to cost of production and prices, fairly warrants the use of the foregoing as approximate figures. The estimate of cost to the grower is low rather than high and liable to be increased by frost, ravages of the scale pest, and deterioration of the groves. To this may be added something for increase in the cost of labor.

The rate of $1.25 has been in effect approximately the whole time since this citrus fruit industry became the subject of any considerable movement by rail to eastern cities. It is as high today upon oranges (which constitute the great bulk of citrus fruit shipments) when the shipments aggregate between 20,000 and 30,000 cars annually as it was when but a few hundred cars were moved during the season and when the rate as applied to that movement was low."

Consolidated Fordwarding Co. v. Southern Pacific Company, 10 I. C. C. Rep. 594, 595.

In its said supplemental report the Commission found the rate of $1.25 a hundred excessive and unreasonable.

The defendant carriers both had contracts with the so-called "private car lines", in and by which citrus fruit was carried in ventilator and refrigerator cars, and in addition to the tariff rate of $1.25 a hundred, amount-

ing to $325 a car, the car lines, under their contracts with the railways, exacted a charge varying from $50 to $100 a car for icing citrus fruit en route to eastern points.

The total freight paid by the orange shippers, including icing charges, amounts to from nine to twelve millions of dollars a year. In some years the growers make a little money but in other years the railways take the entire crop value.

These facts contained in the reports of the Interstate Commerce Commission above mentioned are referred to as showing in part the extreme hardship toward the orange growers, and the unreasonableness of the exactions of the railways *in enforcing a practice by which they took the control of the freight away from the orange shippers and arbitrarily routed it over any line which the carriers might designate in order that the railways could effectuate a pool of their earnings and a division of their freights.*

Railway Rates Fixed and Maintained by Combination.

Prior to January 1, 1900, there was active competition between the defendant lines and between their eastern connections, for the citrus fruit business.

The rates were fixed and established by a combination between the defendant railroads and their numerous eastern connecting lines, by means of what they designated as a "joint tariff", filed with the Commerce Commission, and which rate was maintained by agreement between them, through the Railroad Association called

the Transcontinental Freight Bureau, and was further governed by the provisions of the Interstate Commerce Act which was a part of the contract, and the provisions of paragraph 6 of section 6 of that act, prohibit any advance in rates except after ten days notice, and forbids reduction except after three days' notice.

By this arrangement the rates were fixed by these competing lines at $1.25 a hundred on January 1, 1900, and ever since been maintained.

The joint tariffs of the defendants and their connecting lines, showing rates so fixed and maintained by simultaneous action between these competing roads, are in evidence in the case. [R. 466, 474, 357.]

F. M. Nadal, who handled the diversion of cars for the Southern Pacific system, with offices in Chicago, testified as follows:

"Q. Does the Transcontinental Freight Bureau have anything to do with the citrus fruit traffic?

A. It publishes the tariff.

Q. It publishes the tariff on citrus fruits?

A. Yes, sir.

Q. How long has the Transcontinental Freight Bureau to your knowledge, been in operation, and what is the scope of its business?

A. Well, this organization has been in operation ever since I was connected with the company—in 1896—and I suppose previously, some organization. Whether it was under the name of this bureau or not I can't say.

Q. Who composes the Transcontinental Freight Bureau?

A. The officials of all of the lines parties to the tariff.

Q. Where do they meet?

A. Well, they meet at different points. Some-

times in Chicago, sometimes in Milwaukee, sometimes in San Francisco.

Q. Where do they generally meet?

A. I think at Chicago more often than elsewhere.

* * * * * * * * * * * * * *

Q. Well, what does Mr. R. H. Countiss have to do with the Transcontinental Freight Bureau?

A. Why Mr. Countiss is appointed by the different lines as the agent. He compiles the rates, submits propositions by correspondence to the different lines in interest, and they vote upon the question at issue.

Q. Changes in tariff rates, joint tariff rates, filed with the commission, are made, then, through the Transcontinental Freight Bureau?

A. Yes, sir.

Q. State, if you know, how changes in rates are consummated.

A. Well, if a shipper wants a reduction in rates he submits a proposition to some of the lines, and it is submitted to the bureau, and he issues a circular—

Q. Who does?

A. Mr. Countiss. Sends that to the different members of the bureau, and they make their replies, objections, affirmative and negative votes." [R. 304, 305.]

Rates Maintained by Intimidation.

These so-called joint rates, arbitrarily fixed between these "competing lines" were maintained by punishment, inflicted upon any line which offered competition in rates or service, or, in the language of Mr. Sproule, traffic manager of the Southern Pacific, in "cutting the rate", by expelling such railroad from the association, withdrawing from it all through business, and isolating it so as to make it in effect a local line. [R. 936, 937.]

Mr. Bissell, of the Atchison, testifies to the same effect. [R. 884.]

Also Mr. Morton. [R. 127]

The facts found by the Interstate Commerce Commission [R. 55-77] were thoroughly supported by additional testimony taken in the Circuit Court, and the Circuit Court in its final decree found and adjudged as follows:

> "That the allegations of fact made in the bill of complaint herein are true." [R. 112.]

The bill of complaint set forth as a part of it, the report and findings of fact of the Commission, *and also expressly averred that the routing rule of the defendants, before mentioned, was discriminative in its operation, and was in violation of law.* [R. 10, 11, 12.]

The findings of fact of the Interstate Commerce Commission also contain the following:

> "The defendant carriers have in effect a common tariff on citrus fruits from Southern California shipping points to the Missouri river and points east thereof. This joint tariff fixes a single or blanket rate of $1.25 per 100 pounds to practically all points on and east of the Missouri river, and names 183 participating roads, which are classified in the tariff as western roads, New England roads and roads in Trunk Line and Central Freight Association territories. Thirty-one carriers in southeastern common-point territory are also named."
>
> * * * * * * * * * * * * *
>
> "The tariff prescribes the following general rules" * * * * *
>
> " '*In guaranteeing the through rate named herein, the absolute and unqualified right of routing beyond its own terminal is reserved to initial carrier giving the guarantee. In accordance with this rule,*

agents will not accept shipping orders or other documents, if routing instructions are shown thereon. Neither will agents accept verbal routing instructions.'"

* * * * * * * * * * * * *

"Although control of the routing was first reserved to the initial carriers in the tariff effective November 15, 1899, the testimony indicates that the rule was not made effective until January 1, 1900. Prior to January 1, 1900, shippers were permitted by the defendants to exercise the right to control the routing and to divert the freight from the destination point or route named in the billing."

* * * * * * * * * * * * *

"For seven or eight years prior to 1900 the shippers of citrus fruits from Southern California to competitive points in the east received rebates ranging from $15 to $25 per car, which were paid in a great many cases by the car-line companies. The published refrigerator charges were exacted and subsequently the 'allowance' was paid back to the shippers. The eastern connections of the defendants also paid these rebates or a part of them through their representatives direct to the shippers. These eastern connections are also shown in some cases to have paid the car-line companies more than the actual car mileage charges, in order, as Mr. Earl, of the Continental Company testified, to help out the car-line in paying the rebates.

The payment of these rebates was well known, and they were made generally to all shippers. Rebates were paid when the car was not refrigerated as well as when it was, though they were greater when refrigeration was used. The average rebate was $15 when not refrigerated and $25 when refrigerated. It appears that the eastern connections of the defendants were willing to pay these rebates, or their shares of them, in order to have the traffic routed over their lines." [R. 58, 59, 65, 66.]

Establishment of Routing Rule.

Railways combine to destroy competition, and reduction of rates, by pooling earnings and dividing freights by percentages by means of controling the routing.

Notwithstanding the quite efficient mode which these "competing" carriers had of *establishing and maintaining rates* in violation of the Interstate Commerce Act and the Anti-Monopoly Act of July 2, 1890, there still was considerable competition between them to secure the orange business, it being so extremely profitable, and to secure such business, rebates were paid by the railways to shippers, although the established rate on file with the Commerce Commission was not upon its face reduced.

The Interstate Commerce Commission found to the effect that the routing rule was established by the defendants to promote and carry into effect a scheme for the division of earnings and of freights, and to prevent competition, and these findings were abundantly supported by the evidence, and these facts were also found by the Circuit Court.

The Commission found as follows:

> "The defendants claim that the rule reserving to the initial carriers the right to route the traffic was necessary to enable them to secure a discontinuance of a practice of paying rebates which prevailed previous to the establishment of the rule, and which is referred to in another part of these findings. Just how the rule actually operates to prevent rebate payments by connecting lines or others is not disclosed. The situation warrants the inference, however, that *these two initial carriers or systems, connecting*

with other carriers at various points, and they in turn connecting with numerous other carriers as shown by the tariff, are able by acting in concert, and routing as they see fit, to only send traffic over the roads of such carriers as fulfilled an agreement to refrain from making any rate concession to the shippers, and some influence of like character could doubtless be exerted by them upon the car lines which are also hereinafter referred to." [R. 62.]

"The complainants allege that these carriers pool the business and divide the net proceeds or revenue. This is denied by the defendants both in the answers and testimony submitted on their behalf.

It does appear, however, that these two systems endeavor to preserve the equal division of this traffic, and with both carriers acting together to secure that result one efficient means to such end would be the operation of their tariff rule reserving to themselves the routing of the freight to eastern destinations as they see fit." * * * "It was admitted by Mr. Stubbs, the traffic manager of the Southern Pacific, at the hearing in Washington that the way the cars were apportioned between the car lines by the railroad company may be called a division, but he claimed that it was not an unlawful division." [R. 67.]

"The routing circular of January 20, 1900, extracts from which appear herein in connection with the finding as to the rule of the carriers reserving to themselves the routing shows that the orange shipments are forwarding by the initial carrier so as to give certain percentages of the traffic to connecting lines." [R. 68.]

The conclusions of the Commission, which, however, are in part statements of ultimate facts, are as follows:

"It further appears that a tonnage pool of this traffic as between the connecting carriers not defendants was established and that the defendants so control the routing as to give specific percentages of this traffic to their several connections, thereby

fulfilling and giving effect to this unlawful and forbidden arrangement.

Reason is found in the facts shown for the belief that the suppression of the practice of allowing rebates was only an incidental result of and was not the primary or principal object of the defendant carriers in taking over to themselves control of the routing beyond their respective roads, but that the object was to give effect to the tonnage division before stated between their connections." [R. 74, 75.]

"Our conclusion is that the practice of the defendant carriers in denying to the shippers the use of their transportation facilities *by the established routes* is in violation of the statute and, in its application by the defendants to the traffic in question subjects the owners and shippers thereof to undue, unjust and unreasonable prejudice and disadvantage, and gives to the carriers an undue and unreasonable preference and advantage." [R. 77.]

Prior to the year 1900 there was an actual reduction in the tariff rate on oranges by means of the payment of rebates.

These rebates were paid not only by the connecting lines of the defendants, but were also paid by the defendants themselves.

The method of paying the rebates, without having such payments appear upon the face of the books, was to make fictitious allowances from the railways to the car-lines, by which the car lines were paid for a so-called "excess" of mileage which had not in fact been earned, and the money so allowed was then used by the car-lines to rebate to the shippers.

Mr. Chambers, general freight agent of the Atchison Railway lines, explains how it was done in the following language:

"Q. To whom did the car lines pay these rebates?
A. They paid them to the shippers.
Q. And do you know where they got the money?
A. Got the money from the railroads.
Q. In what way, if you know?
A. Well, generally the plan was to get an ***excess mileage,*** that is, additional mileage, allowance. The standard mileage for private car lines is three-quarters of a cent west of Albuquerque. That is speaking for the Santa Fe. And east of Albuquerque it was one cent a mile. This allowance was made to all private car lines handling perishable freight. Now, the lines east of Ogden and El Paso paid one cent per mile. The car lines would arrange with the railroads for an allowance, say, of a cent and a half a mile, and agree, in consideration, that they would give the railroads a certain amount of business. And out of that *excess mileage allowance* they would pay the shipper. They would go to the shipper and contract with the shipper for the routing of his business and route the business over the lines with whom they had arrangements for additional mileage.
Q. *Then the railroad company would pay to the car line an excess per mile on the mileage of the cars?*
A. *Yes sir.*
Q. And that money was used by the car line to pay rebates?
A. To control it.
* * * * * * * * * * * * *
A. * * * * That year I think the Arlington Heights Fruit Company controlled about five hundred carloads of citrus fruit. I then called on the manager of the Continental Fruit Express, to find out what the trouble was and I soon learned. He said to me that if the Santa Fe Railroad would allow the Continental Fruit Express excess mileage amounting to ten dollars per car to Kansas City and twelve dollars and a half per car to Chicago that the business of the Arlington Heights Fruit Company would be sent over the Santa Fe lines; other-

wise the Continental Fruit Express could not afford to let the business go over the Santa Fe lines, as they had contracted to pay the Arlington Heights Fruit Company a certain amount per car for the routing. The case of the Arlington Heights Fruit Company is a fair example of all the other business.

* * * * * * * * * * * * * *

Well, we were obliged to meet the situation. We had to satisfy the Continental Fruit Express, and we did so and got the business." [R. 890, 891, 892.]

Mr. Sproule, traffic manager of the Southern Pacific Railway, explained the matter as follows:

"A. They (the Atchison Ry.) wanted us to join them in meeting the competition as they found it. The competition that our connections found was as much the competition of our other railroad connections, their competitors although our connections, as it was the Santa Fe. *But by this time the demoralization had spread so that there was no line handling oranges except the line that would pay these rebates, whether by car mileage or other devices; generally, as I have stated, car mileage.* It can be laid down that every road east of Ogden, El Paso, and Albuquerque that was handling oranges was being bled."

* * * * * * * * * * * * * *

"Q. The idea was the restoration of a normal tariff, was it not?

A. The restoration of the tariff that they had joined us in making and out of which they expected to get their stand—their regular percentage of revenue in accordance with the current division sheets. *Instead of that, there was a published tariff under which they were supposed to be doing the business, and in relation to which the effect of it was that it was another tariff altogether,* because there had certain slices to be cut off of it in order to pay these illicit rebates, and the business, consequently, was done by our connecting roads, at a reduced figure, lower revenue." [R. 918, 919.]

Mr. Bissell, assistant traffic manager of the Atchison Railway, said:

"A. *Why, I suggested to them (eastern lines) that if the initial roads exercised their right of control of this freight, that it would do away with the payment of rebates and would relieve them from the tribute that was being exacted by the car lines, for the reason that there would be no inducement then to pay any rebates because they could not tell whether they would get the business after they agreed to pay the rebates;* that is, they might agree to pay rebates on certain business and it might move over other lines, being made good to them by some other business on which they had no arrangements."

* * * * * * * * * * * * *

"Why, the car lines were operated over the two routes from California. They were free, at that time, to make arrangements with any lines that connected with the Santa Fe at any junction, and the natural result of that was that as the rebates grew in volume the Santa Fe Company was deprived of the long haul; the business would be diverted from our line at Kansas City, for instance, instead of going through to Chicago, or it would be diverted at Pueblo instead of going through to Chicago; and while I don't think that our competitors, the Southern Pacific, were paying any rebates at that time, the result of it was that their connections were paying rebates, and that necessitated the extension of the rebate system west over the Santa Fe lines to a point that was equal with the point of junction of the Southern Pacific with its connections. For instance, if the Union Pacific and the Rio Grandes were paying rebates through the car lines on business routed via Ogden, that brought the maintenance of rate back to the Ogden gateway, and we had to equalize on our lines, say, at Albuquerque."

* * * * * * * * * * * * *

"On a car of oranges moved from Los Angeles to New York there was $15 a car, we will say,

paid east of Chicago. As long as that was all the rebate there was paid, it didn't affect the Santa Fe nor the Southern Pacific. And then, we will suppose that the line between Chicago and Omaha came into the field and added $10 more or $5 more, we will say, and then the line from Ogden to Omaha added another $5; that would make $25 to New York via the Union and Central Pacific, while via our line, there would only be the $15 unless the connections east of our junctions added something to make that good. Of course you understand that the rebate—the result of the rebate system is that when it was vogue that we all gave away so much money and got down to a parity; in the end, we were no better off than we were on the start. Now, the Santa Fe had—if they wanted to keep the freight hauled through on their line to Chicago, they had to assume in some manner the payment of this extra $10 between Albuquerque and Chicago, bringing it up to $25, which, in the case I have outlined, would be the rebate via the Ogden line, and we had to equalize it."

* * * * * * * * * * * * * *

"Q. Had the business of citrus fruit shipping been leaving you before you established this practice of routing?

A. Yes, sir. WE MADE SEVERAL ENDEAVORS — WE TRIED THE COSTLY EXPERIMENT OF BEING HONEST IN THIS THING, LIVING UP TO THE LAW AS WE UNDERSTOOD IT AND DECLINING TO PAY REBATES; AND WE LOST SO MUCH BUSINESS THAT WE FOUND WE HAD GOT TO DO AS THE ROMANS DID, AND AS THERE SEEMED TO BE AN IDEA THAT THE CAR LINES WERE EXEMPT FROM THE INTERSTATE LAW, WHICH PROVIDED IMPRISONMENT FOR RAILROAD MEN CAUGHT DOING THIS THING, WE HAD TO ARRANGE TO DO OUR BUSINESS THROUGH AN OUTSIDE CAR LINE.

Q. Did you have a car line operating on the Santa Fe?

A. Well, we had—we didn't have an outside organization until this rebate business came up. We then provided an outside organization and leased our cars to it in order to endeavor to hold the business to us that we thought rightfully belonged to us." [R. 864, 865, 866 and 868.]

Mr. Morton, second vice-president of the Atchison Railway in charge of freight traffic, testified as follows:

"A. The rate from Riverside, California, to New York city is $1.25 per 100 pounds of oranges in car load lots. The connections of the Southern Pacific between Ogden and the Missouri river would pay $15 per car, and the connection between the Missouri river and Chicago would pay $10 a car. That was $25 a car that the Atchison railroad would have to pay or forego the business. It did not make any difference to the Atchison system whether the cut in the rate was entirely west of Ogden or whether it was east of Ogden or at El Paso. It made no difference to it whether the cut was made by the Southern Pacific or by some connection of the Southern Pacific. *So far as the cuts in the rate east of Chicago were concerned, we generally were able to secure for oranges moving over our line the same concession that was made on oranges originating on the Southern Pacific coming east by the Southern Pacific. Do I make myself plain?"*

* * * * * * * * * * * * * *

"Now, it cost our car company the last year, the year preceding 1900, quite a large amount of money to meet this competition, and shippers in Southern California who did not get the full benefit of this reduction and who had to divide it with Mr. Earl and others, naturally were indignant, and it was in order to prevent that state of affairs solely and for no other reason in the world than to maintain legal rates that we took the routing of this business into our own hands." [R. 121, 122.]

Also as follows:

"A. There was a general understanding, so far as the roads east of Chicago are concerned, that if any of them cut the rate after the first of January, (1900) they would be deprived of business.

Mr. Dunlap: 'Cut it', how; by rebate?

By Mr. Norton:

Q. What do you mean by 'cut it'?

A. I can't explain any more. If you don't understand I can't explain it. You know what cutting a rate is, don't you?

A. I wanted to get the explanation on record By giving a rebate you mean?

A. Certainly. This cutting of rates was all done secretly. There was no publication of tariffs or anything of the kind. It was all in violation of the interstate commerce act.

Q. And in violation of your published tariff?

A. And in violation of our published tariff.

Q. That is what I wanted to get at. Now, you stated that the sole purpose of assuming control of the routing was to do away with the condition that you have described?

A. That was, I won't say the sole purpose, but the chief purpose. *I might say the sole purpose was to maintain our rates.*" [R. 124, 125.]

Mr. Barnwell of the Atchison Railway also testified that the "Routing Rule" was devised "to prevent the cutting of rates" and that its operation did have that effect. [R. 453.]

To thus destroy competition the unlawful agreement and combination was made between the Santa Fe system, the Southern Pacific system, and their connecting lines, to abrogate the joint tariff on citrus fruit in force prior to November, 1899, and to place in effect a new joint tariff which was in fact filed and made effective January 1, 1900, [R. 456, 466] and further, to insert in the new

tariff a provision reserving to the initial carrier the absolute and unqualified right to route the freight, whereby the freight was to be arbitrarily divided and incentive to competition destroyed.

But before doing this, a meeting was held at San Francisco at which the initial and connecting lines were all represented, and at which meeting the following letter was transmitted to all the connecting lines over 200 in number, from the joint agency of the Southern Pacific and Atchison systems, signed by R. H. Countiss, agent:

"8593.

Representing

SOUTHERN PACIFIC CO., UNION PACIFIC R. R., RIO GRANDE WESTERN RY., TEXAS & PACIFIC RY., SANTA FE SYSTEM.

San Francisco, Oct. 9, 1899.

CITRUS FRUIT TARIFF.

DEAR SIR:

At a conference held in this city on the 6th and 7th inst., at which the California terminal lines and their direct connections were represented, special consideration was given to Citrus Fruit Tariff, and in order to effectively promote the observance of the Interstate Commerce Act, thereby conserving the lawful interests of all concerned in the traffic, it was

Resolved, That current Citrus Fruit Tariff be cancelled November 14th, 1899, and taking effect November 15th, 1899, *Agent Countiss publish for each of the roads represented at this conference, a tariff in connection with specified routes, comprising roads that give express assurance that they will not deviate from the rates provided therein, directly or indirectly, by any method or device, whether in conjunction with carriers, shippers, consignees or car lines.*

In full assurance of their good faith, each road, in consideration of being made a party to the new tariff, shall give its assent to the cancellation of said

tariff so far as its own road is concerned, in event that rates are not absolutely maintained by it as contemplated in foregoing.

Further, said tariff shall bear the following lawful provision:

'In guaranteeing rates, the absolute and unqualified right of routing beyond its own terminal, is reserved to initial carrier giving guaranty.'

May I ask that you promptly advise me as to whether you will give the assurances which, under the above resolution, are requisite to representation to your company in the proposed new tariff and oblige,

Yours very truly,

(Signed) R. H. COUNTISS, *Agent.*

General Note: Indefinite or evasive responses will be construed as indicating an unwillingness to give the desired assurances." [R. 875-878.]

Mr. Bissell says that this letter and the joint tariff were agreed to by all the connecting carriers shown in the joint tariff of January 1, 1900. [R. 875.]

Mr. Countiss was the joint agent of all of the railroads, parties to the joint tariff of January 1, 1900.

Under date of December 21, 1899, Countiss as joint agent of the combined roads issued instructions to all lines. [R. 797-799.]

Mr. Bissell naively said that the Santa Fe road "tried the costly experiment of being honest," and that the deal between the initial carriers and connecting lines, "was not one of those things that you wanted to write about very much," and yet, these competing lines were, bold enough to meet together in violation of the Commerce Act, and agree upon a rate, and further than that, solemnly agreed "that they will not deviate from the rates provided therein, directly or indirectly."

The next step was for Mr. Sproule, traffic manager for the Southern Pacific, and Mr. Bissell, traffic manager for the Atchison, to send out the following telegram under date of December 19, 1899, to the connecting lines of the defendant railroads, distinctly stating that the operation of the routing rule was for the purpose of *"protecting your interests in the traffic at full tariff rates."*

"12-19-99.
Wm. Sproule, D. H. 7168.
W. A. Bissell, D. H. 8741.
E. F. Cost, C., C., C. & St. L. Ry., Cincinnati, Ohio.
James Webster, Nickel Plate, Chicago, Ills.
Sam P. Shane, Erie R. R., Cleveland, Ohio.
George B. Reeve, Grand Trunk Ry., Montreal, Que.
G. J. Grammar, L. S. & M. S. Ry., Cleveland, Ohio.
B. B. Mitchell, Michigan Central, Detroit, Mich.
E. L. Dawson, Pennsylvania Co., Chicago, Ills.
B. D. Caldwell, D., L. & W. Ry., New York City.
H. H. Kingston, Lehigh Valley, New York City.
S. B. Knight, Wabash R. R., St. Louis, Mo.
A. P. Bigelow, B. & O. R. R., Chicago, Ills.
A. S. Crane, Fitchburg R. R., Boston, Mass.
H. B. Chapin, Boston & Albany Ry., Boston, Mass
W. F. Berry, Boston & Maine, Boston, Mass.
S. T. McLaughlin, B. & O. S. W., Cincinnati, Ohio.

On and after January first, nineteen hundred, California terminal lines have made arrangements for routing the citrus traffic from California through to final destination. Have further arranged that no diversions shall be made without consent of terminal lines, and *have notified the car lines interested, who are agreeable to the changed conditions.* From this action you will see that if any special arrangements have been made by any lines east of Chicago or St. Louis looking to the control of the business either through car lines, shippers or any other source, that the results expected cannot be obtained thereby, and we would respectfully suggest their cancellation. This result

you will see is in line with giving the legal protection contemplated to all shippers alike and *protecting your interests in the traffic at full tariff rates.*

WILLIAM SPROULE.
W. A. BISSELL."

[R. 869, 870.]

To this telegram various answers were received by connecting lines, heartily co-operating in the plan to prevent "rate cutting" and to maintain the agreed tariff. [R. 870-875.]

These letters and documents conclusively establish a perfect combination between these two competing lines to fix, maintain and control rates and suppress competition.

By these unlawful combinations and arrangements, the rate was advanced over and above what was charged, in fact, in former years, and firmly fixed at the advance so made, but to destroy all inducement for competition in the rates thereafter, as well as in service, it was solemnly agreed between the defendants and connecting lines that the citrus fruit business should be divided over the connecting lines through the instrumentality of the initial carrier acting as a sort of arbitrator for the competing connecting carriers.

Southern Pacific Percentages.

In pursuance of the agreement mentioned and the resolution and letter of October 9, 1899, above mentioned, and of the provisions inserted in the joint tariffs of January 1, 1900, *the Southern Pacific Company issued to its agents, its private instructions prescribing the exact percentages of freight to be routed over each one*

of the numerous connecting lines of that system which connections included railroads in Canada. [R. 599, 715, 761.]

Atchison Railways Percentages.

The *Atchison, Topeka and Santa Fe Company,* in pursuance of the written agreements above mentioned and of the provision of the joint tariff of January 1, 1900, *also issued its secret instructions to its agents marked "private", dividing the business in citrus fruit among its connecting lines according to fixed percentages.* [R. 368, 384.]

The Atchison Railroad in these instructions to local agents fixing percentages of citrus fruit business over connecting lines, directs among other things, as follows:

> *"7. When a shipper asks for some particular delivery and you are satisfied that it is necessary to the business that it be given, and if the route is one authorized in this circular, you may write as the shipper desires so far as the delivering line is concerned. If any intermediate lines you will use each of them as will serve to divide the business in accordance with the proportion shown herein."* [R. 369.]

It thus appears that under no circumstances were connecting lines to be selected by the shippers which would in any way alter the percentages fixed by the Atchison Company and deliveries only by the delivering line were allowed where it would not result in any inconvenience.

The Southern Pacific Company has been equally specific in its "confidential" instructions to agents concerning the percentage of business awarded to connect-

ing lines and that company directs its agents that "preferred deliveries" may be allowed to shippers under certain circumstances, and also directs specific routings in certain instances, but expressly provides in the instructions that such *"preference should be considered in the percentage allotted, to those particular lines as per the above percentages, and not as an addition to the percentages above shown."* [R. 608.]

So that whatever may be said about the defendant carriers complying with "requests" of shippers as to deliveries or routings, such requests can only be complied with *in so far as they do not interfere with the percentages awarded to each connecting line.*

In other words, if one shipper requested his freight to go by B. & O. east of Chicago, such request may be granted provided enough freight remains to give the other roads their percentages, but that such request must be ignored if the routings or deliveries interfere with the percentages.

It has been contended by several witnesses on behalf of the defendant carriers that these percentages were not fixed and certain, but could be varied at any time by the initial carrier and that there was no agreement to give any road a certain percentage.

In answer to this it is submitted that even if the percentages were not fixed and invariable from year to year, yet if they are acted upon for a time the thing prohibited by the law will be consummated. The competition of connecting lines is thereby destroyed, and no reduction of rates or better service by the connecting line could give such line more business.

If the business is arbitrarily divided through the medium of the initial carrier, a monopoly is established and the incentive to competition in rates and in services taken away.

But the evidence establishes beyond question that when the percentages of all the connecting lines were fixed, taking effect January 1, 1900, that from that date down to the present time, there has been no substantial change in such percentages. [R. 234 bottom.]

No business has been taken away from any line for delay in transit, failure to return cars, refusal to exchange business, for expedited service, or for any other reason. [R. 234, 449 top, 885, 886.]

The claim made by the officers of the Southern Pacific, that they have always endeavored to extend to shippers and growers of citrus fruit, their paternal aid in selecting those routes for eastern shipments which are open and least effected by weather, and where the best service is given, is utterly repudiated in the instructions to local agents above mentioned. Instructions further provide:

> "On days when a few cars are shipped all may be routed via one route and via another route the next day, and so on, but the result to be as above, as near as possible." [R. 610.]

The complete details between the Southern Pacific and Santa Fe roads to divide the shipments through the routing rule is further shown by the instructions of the Santa Fe road providing for diversions from the Santa Fe lines at Colton and Los Angeles for freight destined to eastern points and providing for the routing of such

freight *by the Southern Pacific over its lines.* [R. 369.]

Division of Business Between Initial Lines.

While the citrus fruit industry in California is confined to a few places, and the entire acreage would probably not exceed 80,000 or 90,000 acres, equal to four congressional townships [R. 229] it was claimed by Mr. Sproule that the freight business in citrus fruit was nearly equally divided between the Southern Pacific and Santa Fe *by reason of division of mileage, each road having some 250 miles or a total of 500 miles in the orange district,* but it seems that these two systems have had as little difficulty about dividing railroad mileage or making paper calculations of such mileage, as they have had in dividing oranges. The testimony shows that the principal places where oranges are raised are in the vicinity of Redlands, Riverside, Corona, and Pomona, and something like 70 miles of railroad would reach all of these places, so that the pretended division of 500 miles is arbitrary and baseless.

Be this as it may, these two systems were not satisfied with their division of mileage but entered into an understanding or agreement to physically divide the cars of oranges shipped each season giving to each system one-half as nearly as practicable.

This division was mainly blocked out by a division of fruit car equipment and was then adjusted nicely by means of the "routing rule".

Mr. J. C. Stubbs, a vice president and "traffic director" for the Southern Pacific Company [R. 287] testified in a former hearing before the Commerce Commission,

and his testimony has been by stipulation introduced in evidence in the present case.

In that case Mr. Stubbs said in January, 1902:

> *"There is an understanding, but it is not in writing—you might say it amounts to an understanding that so far as the orange business is concerned we will endeavor to work an equal division of that traffic.* That arises from the fact that it is about so divided in its production on our local lines in California. There is about 50 per cent of that produced on the lines owned by the Santa Fe, and about 50 per cent produced on the Southern Pacific and so far as possible we agree that we shall not interfere with each other's local business." [R. 288.]
>
> See also Findings of Com., R. 67.

The division of fruit traffic between the Southern Pacific system and Santa Fe system so as to give half to each, was first blocked out through a division of car equipment.

The citrus fruit is carried in refrigerator and ventilator cars specially made for the traffic.

The Southern Pacific has an exclusive contract with the Armour Car Lines, by which the Armour Car Lines has the exclusive right to operate its refrigerator and ventilator cars over all the Southern Pacific system. [R. 293, 296.]

The Atchison system has an exclusive arrangement or contract with a corporation called the "Santa Fe Refrigerator Despatch", by which the "despatch" has an exclusive right to operate its refrigerator and ventilator cars over all lines of that system, and the Atchison, Topeka and Santa Fe Railway Company is the owner of all the stock of the Santa Fe Refrigerator Despatch, and

controls the operations of the despatch through officers selected by it. [R. 134.]

These fruit cars are to be furnished from time to time as demanded by the respective railroads.

The exact method of dividing the business is for the agents of the Southern Pacific and of the Atchison and Santa Fe to estimate the orange crop at the beginning of the orange season on November 1st, *and then each road determines what amount of the equipment will be required to transport one-half of such crop.* Each system then orders cars from time to time for *its half,* each one understanding that the other is arranging to transport half and no more, and thus carrying a half and half only by each line.

Mr. Edward Chambers, general freight agent of the Atchison lines west of Albuquerque, testified as follows:

> "The Santa Fe policy is to take 50 per cent of the business; that is, the proportion of the business that the officers that dictate the policy of the road say; that is, the instructions to myself as general freight agent, to see that we take 50 per cent of the citrus fruit business and all of our car supply our basis for car supply and for ice and all the arrangements we have to make in advance of the crop, are made on that basis.
>
> Q. That is the number of refrigerator cars and tons of ice?
>
> A. And the additional cars we may need over what was in use the previous season. Of course that estimate had to be given along in July or August, in case it is necessary to build new refrigerator cars, new ice houses, and get additional ice machines. * * * *
>
> We supply the cars as far as we can, the cars in the service that are ordered and that are in the service are moved regularly, with as much regularity

as we can move them, and when they are in California ready for loading, we supply them when they are ordered. We supply Santa Fe cars. When it gets to the place where we cannot supply all that are ordered or asked for by the shippers, we discriminate. We deliver the shipper when the supply of Santa Fe cars is exhausted—we tell him that if he cannot wait until we get cars, in the territory to supply him that we will order for him Southern Pacific cars, but I want to say that there are no Southern Pacific cars forced upon any shipper at all. *They voluntarily take them and load them after they have been told they cannot get Santa Fe cars.*

Q. If you do furnish them Southern Pacific cars, you ship over the Southern Pacific?

A. Yes, because those cars cannot run over the Santa Fe lines. There is no arrangement for them to run over our lines. All shippers understand how they move. * * * *

A. *The freight equipment about, as I said before—the car supply about divides the business just in the proportion I have stated.* * * [R. 187, 188, 190.]

Well, the instructions I have received is a fair share of the citrus fruit traffic for the Santa Fe lines—fifty per cent one-half of the business. [R. 197.]

Q. That division of the equipment works that result without any special effort?

A. It approximates that result. It don't work it out exactly. In the heavy shipping season it is a question of cars always for the three months, for March, April and May, and sometimes February. * * * [R. 197.]

Q. You estimate that the cars you provide for will handle one-half of the crop?

A. That is the basis, yes sir. [R. 198.]

We seek to move not more than fifty per cent. We base the order for cars on fifty per cent of the crop as estimated. [R. 214, 215.]

A. The Southern Pacific understands just what we seek to take.

Q. And you understand just what they seek to take?

A. Yes sir." [R. 215.]

Mr. W. B. Biddle, an officer of the Santa Fe Company said in regard to the testimony of Mr. Chambers:

"It is absolutely correct." [R. 221.]

Mr. W. G. Barnwell, freight agent of the Santa Fe system, testified:

"Yes, in a general way, when it comes to the matter of car supply we talk it over. If they are short of cars, or rather if we are short of cars, we will ask them to send their cars over and we will load them up and let them go back over the Southern Pacific, let them go east over the Southern Pacific. * * *

I said if we are short of cars we would take their equipment and load it on our rails and ship east via their line. * * *

Q. What do you do in case they are short of cars?

A. We do the same way if they will take them. They are there for them. We offer them the shipments of the cars if they want them, and those cars would go east over our line if loaded on their rails." [R. 451 and see 901.]

It is entirely obvious that the finding of the Commission above referred to, to the effect that these two systems, the Southern Pacific and Santa Fe, do endeavor to divide the citrus fruit freight business between them, and that they are greatly aided therein by the routing rule reserving to the initial carrier the right to route is fully established.

It is quite clear that if the shipper exercised the right of routing that he could route over any line he saw fit,

and the equal division of business would be done away with.

The record in this case is filled with testimony showing the unlawful and arbitrary action of the roads in dealing with shippers.

Very numerous witnesses have shown by their testimony that these two systems work a division of the citrus fruit business through the routing rule and car equipment by routing shipments over the line of road of the other, which ought to be a competing line. [R. 149, 152, 173, 228, 167, 168, 170, 174, 176, 238, 275, 187, 901.]

These witnesses state that during one period the Atchison Santa Fe system at one station diverted a third of its own cars to the Southern Pacific lines, shipping them east over the Southern Pacific [R. 173], and at another time half of the Santa Fe cars were diverted to Southern Pacific lines at a certain station or shipping point. [R. 238.]

Numerous witnesses testified, and the fact was established indisputably, that the Atchison Santa Fe system, having its own lines to Chicago, and being the shorter and more direct route, was greatly preferred by shippers, and that under normal conditions that system would naturally carry much more than half of the orange freight. [R. 179, 172, 173, 174, 239.]

Under the routing rule the shippers did not know, after the oranges left the depot, whether they went east over Southern Pacific lines or the Atchison Santa Fe lines, and frequently they were kept in ignorance of where their fruit was for several days, they not knowing whether it had gone by Sacramento and Ogden or

by Kansas City and Chicago, or by Galveston and New Orleans.

The operation of the routing rule alone made it possible for these two systems to work an equal division of the freight, and to nicely equalize the traffic and smooth the rough edges where the division of equipment did not exactly perform that function.

Actual Shipments by Southern Pacific and Santa Fe Show Nearly Equal Division.

The testimony shows that from November 1, 1897, to March 31, 1903, there was a total of 88,284 cars of citrus fruit shipped from Southern California to eastern points and that the Santa Fe carried during that period 45,037 cars [R. 180, 181], and during that period the Southern Pacific carried 43,211 cars [R. 283], showing that the Southern Pacific carried about one per cent less than an even half of the total number of cars. The proportion was about the same for remainder of 1903. For that period there were 20,748 cars. The Santa Fe carried 10,758 cars and Southern Pacific 9990 cars. [R. 137.]

In the face of this arbitrary and practically equal division the testimony further shows that shippers of citrus fruit generally preferred the Santa Fe system by reason of its own line to Chicago and its directness, and this was admitted by Mr. Chambers [R. 179], and proven by other witnesses. [R. 172, 173, 174, 239.]

It is submitted upon this review of the evidence that the findings of the Commission and decision of the Circuit Court to the effect that the routing rule is an essential and efficient means for carrying into effect an un-

lawful traffic pool between the connecting lines, and also to divide the freight between the initial lines, are conclusively established by the evidence taken in the court below.

It is further insisted on behalf of plaintiff, that no evidence entitled to weight has been introduced by the defendants, even tending to overcome the effect of these findings of the Commission as *prima facie* evidence.

Car Lines Aided Railroads in Dividing Business.

Mr. Earl, president of one of the car line companies which is now operated through the Santa Fe Refrigerator Despatch, testified in the year 1900 before the Commission, that of the three car line companies which monopolized both Southern Pacific and Atchison lines, that the business was divided between them as follows:

The Continental Fruit Express, 37½ per cent, the Fruit Growers Express, 37½ per cent, and the Santa Fe Refrigerator line, 25 per cent. [R. 152.]

At that time these three lines operated over both systems of roads.

Mr. Earl further testified as follows:

> "Q. Was there any percentage or basis of division between the car lines that year?
>
> A. Well, as I stated before, the railroads made their requisitions on the car lines to furnish cars from time to time. As the season progressed, and shipments were heavy, they asked for more cars. If the shipments were light, as they were at certain times in the 12 months, they asked for less cars, and whatever cars they had from the car lines determined the percentage each car line had in the business."

George B. Robbins, president of the Fruit Growers Express (Armour Car Line), wrote to Mr. W. Sproule, freight traffic manager of the Southern Pacific in the latter part of 1899 as follows: [R. 169.]

> "In this connection beg to state that in the interest of harmony, and for reasons which I will explain some time when I see you, I desire to suggest that it might be well for your company to take 250 more cars from the C. F. X., and the Santa Fe the same, provided always that the number of their cars used does not exceed the number of ours, either in your own or the Santa Fe's service."

The Commission expressly found, as follows:

> "It was admitted by Mr. Stubbs, the traffic manager of the Southern Pacific, at the hearing in Washington that the way the cars were apportioned between the car lines by the railroad company may be called a division, but he claimed that it was not an unlawful division." [R. 67.]

It is submitted that the case clearly establishes that a combination and arrangement exists between the Southern Pacific and Santa Fe systems, to divide their freight in citrus fruit in violation of the Commerce Act and that a further combination and arrangement exists to divide the freight originating on both these lines, between connecting carriers to give a certain percentage to each such connecting line, and that both of these unlawful combinations are made effective, through the rule reserving to the initial carrier the routing of freight.

The evidence clearly establishing this, is shown by the findings of the Commission, by the testimony of the officers of the Southern Pacific and Santa Fe roads, by the actual result of shipments for a term of years, and by the

testimony of numerous shippers showing a diversion of cars over one line to the other, and a shortage of cars first on one line and then on the other, compelling shipments over the other naturally competing line, and is corroborated by the testimony showing that the car lines have at all times aided in such division of business.

Routing Rule Discrimatory.

The findings of the commission sustained by the Circuit Court that the routing rule of defendants works an unlawful discrimination are fully sustained by the evidence.

The freight pool established by the routing rule suppressed competition in *service* as well as in rates.

Neither celerity of movement nor other competition could or would result in increasing the business of such line and the testimony conclusively shows it has not done so.

The natural result was that the time in transit has been increased since January 1, 1900, showing that the routing rule discriminates against orange shippers, against the orange industry, and against this locality.

The Commission found:

> *"It is testified, however, and we so find that the time used in transportation to eastern markets, was greater in 1900 than it was in previous seasons."* [R. 71.]

General statements have been made by officers and agents of the defendant roads, to the effect that since the operation of the routing rule the business has been much

more satisfactory to the companies and that freight has moved with less friction and some general statements were also made that the time in transit had improved, but these witnesses produced no statistics showing the real facts.

On behalf of complainant the testimony of A. H. Naftzger, president of the California Fruit Agency, which handles most of the citrus fruit business in Southern California, was taken, and Mr. Naftzger produced a table showing actual shipments from Southern California to eastern points embracing the period from December, 1895, to May, 1896, which was for a season prior to the routing rule, and also the period from December, 1901, to May, 1902, which was under the routing rule [R. 981, 984.]

This table shows that the actual time in transit since the routing rule has been increased from three to four days.

For instance, the average time to Buffalo by the Atchison prior to the routing rule was 9.54 days and since the routing rule the average time was 11.90; to Boston prior to routing rule time was 11.56 days, and under routing rule 14.51 days; to Chicago prior to routing rule was 7.36 days, and under routing rule was 9.32 days.

All these shipments embraced in Mr. Naftzger's table were of undiverted cars.

On cross-examination Mr. Naftzger was asked why he selected the periods named for comparison, and he answered as follows:

> "A. Well, we took 1895 and '96 because we had absolutely accurate records for that season of the movement as reported to us by the carriers them-

selves; that is, the passage of the cars at junction points. We took the year 1901 and '2 rather than the year 1900 and '01, because that was the year when the Santa Fe had its coal strike."

"1900 and 1901 was the year of their coal strike and our crop was very large." [R. 983.]

So the periods selected for comparison were most favorable to the railways, they not being affected by coal strikes or by large crops.

The testimony of numerous other witnesses shows that the routing rule operates to destroy competition as to time in transit. [R. 148, 227, 236, 274, 275, 225, 255.]

Other Discriminations.

Routing rule results in car shortage by reason of operation of arrangement to equalize traffic between roads, and is therefore an obstruction to commerce.

Numerous witnesses show by their testimony and have given particular instances where, under the operations of the routing rule, to divide the freight, car shortage is a chronic condition over both systems, obstructive to commerce and causing great losses to orange shippers [R. 149, 152, 173, 228, 168, 176, 238, 255, 275, 187.]

Routing Rule Prevents Reduction in Rates and Competition Generally.

The findings, the testimony of the officers of the two systems and the correspondence, heretofore set forth, show that the routing rule was put into force to *prevent competition and to maintain the rates.*

Routing Rule Interferes with Diversions of Cars and Sales.

The universal practice has been for shippers to divert cars en route to any points within the territory to which the tariff rate of $1.25 per hundred applies. [Findings I. C. C. R. 60, also R. ev. McLeod 237, 238.]

Mr. Naftzger testifies from actual records, covering a whole season, that of all fruit cars shipped the average diversions amounted to six-tenths of a diversion to a car; in other words, that 60 out of every 100 cars were on an average diverted once. [R. 983.]

These figures from actual records do not harmonize with the general opinions indicating that diversions were numerous.

Shippers agree that under the operations of the routing rule the right of diversion is interfered with and sales are prevented. [R. 257, 274, 152.]

Routing Rule Operates to Send Shipments Over Undesirable Routes Affected by Bad Service.

As to this all shippers agree. [R. 238, 275, 227, 274, 225, 255.]

The Routing Rule Discriminates Against a Commodity to wit: Citrus Fruit.

The evidence shows that except as to citrus fruit the routing rule has not been practiced by the defendant carriers as to interstate commerce generally, and only in special instances for special reasons, has routing been refused over any particular line as to any other com-

modity. [R. evidence of Bissell, 885; evidence of Chambers, 202; evidence of Barnwell, 451, 452; evidence of Morton, 127.]

[Findings I. C. C. R. 62 middle.]

Routing Rule Discriminates Against a Locality to wit: The California Citrus Fruit Belt.

The citrus fruit tariff shows that the routing rule applies only to Pacific Coast points. [R. 357, 368.]

In conclusion of this point, it is submitted that the findings of the Commission and evidence clearly proves that the operative effect of the routing rule was unreasonable, unjust and discriminative; (1) in refusing to the shippers control over their shipments; (2) in interfering with diversions and sale of fruit, the practice of diverting being one of universal custom; (3) in preventing shippers from having knowledge of routes; (4) in wresting control of the shipments from the owner, which he needs for prudent protection of his own property; (5) in denying shippers the shortest and best routes; (6) in resulting in delays in transit; (7) in resulting in shipments over bad lines affected by weather; (8) and in preventing proper marketing of fruit.

General Results Accomplished Under the Routing Rule:

The report of the Interstate Commerce Commission, in its conclusions, portrays in vivid language the results attained by this astonishing and unjustified combination of these two railway systems in violation of the laws of the country, by which they have seized upon one of the

most important industries, having an output of over 24 millions of dollars a year, and have practically appropriated the entire proceeds to their own uses, and are now before this court claiming that what they have accomplished was lawful, and that the millions which they have taken from the orange growers was properly taken by the means described in the evidence.

The Commission says:

> "It is strongly significant also that in respect alone of this freight (the only traffic shown to be covered by the tonnage division arrangement and none other in the whole range of varied commodities and classes of traffic) do the defendants assume to dictate its movement beyond their own roads, *as between the established continuous lines.* It seems an indefensible proposition that a vital right of the shipper shall be sacrified, and violation of one important provision of the statute shall be fostered in order to induce obedience to another. The use of the shipper's property in this manner and to this end is as if it were seized upon, marshaled and maneuvered by the initial carriers for distribution among connections for their own advantage and to satisfy such connections, and thereby hold up rates by unlawful methods, regardless of the rights of the owners of the property handled and used for these purposes. The carrier is a bailee of the property which is in its custody for the purpose of transportation only, and it cannot lawfully wrest from the owner that general control and direction of the same which is deemed by him needful for the prudent protection of his own property and interests and not inconsistent with the due performance of the service undertaken by the carrier.
>
> Moreover, in respect of this traffic shippers are required to release the carriers from liability for damage by the weather, decay, shortage and delay. They are also required to prepay or guarantee freight charges to destination. So that the carriers

> are relieved of the care and risk on his property as to their customary lien on freight for the collection of their charges which, on shipments of this traffic, must be paid whether the goods bring a sufficient amount for that purpose or not. Neither does the initial carrier assume liability for damage resulting from the negligence of any connecting line." [R 75.]

But for the bringing of this suit the "Routing Rule" would have been extended to all freight and all roads in the United States. There would have been one vast monopoly in transportation. [R. ev. Morton 127.]

It is Immaterial that Some of the Facts Found by Commission are Placed Under Head of Conclusions.

It is claimed by counsel for appellants that some of the facts found by the Interstate Commerce Commission are placed in its report under the head "Conclusions".

All the essential and material findings of fact by the Commission are placed under the heading "Facts" in the report.

The contention of appellants' counsel is that under section 14 of the Commerce Act no fact can be considered by the court which is placed under the head of "Conclusions".

This is a technical objection and would indeed be a narrow construction to place upon a statute intended to protect the whole public in their rights over and upon the interstate commerce roads and under a constitutional power of Congress, of an ample nature, to regulate commerce, between and among the states and with foreign nations.

It is submitted that the Commerce Act will not bear any such strict construction as is attempted to be placed upon it, by counsel for defendants.

Section 14 of the Interstate Commerce Act provides,

> "that whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing, in respect thereto which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation, as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found."

This provision of the Commerce Act is quite different from statutes where the trial court is required to make findings of facts upon which the *conclusions of law* are based.

The Commission is to make findings of fact upon which its *conclusions* are based. These conclusions are not necessarily to be *conclusions of law*, but naturally may be conclusions of fact or statements of ultimate facts deduced from the evidence. Such reasonable construction of the act is supported by the provisions of section 16 of the Commerce Act, which provides that in cases where the Commission applies to the Circuit Court to enforce its orders, that

> "said court shall proceed to hear and determine the matter speedily as a court of equity and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises."

The proceedings for the supervision and enforcement of the Commerce Act are thus intended to be liberal, and without the technical rules and proceedings appertaining to ordinary actions, but with a view of doing justice as the law provides.

The Commission does not in stating its "conclusions" that the routing rule or practice is discriminative, state or infer that such conclusions are *conclusions of law,* but from their context it is obvious that they are in part conclusions of fact drawn from the more detailed statements of the evidence preceding.

The principle is well settled upon general authority that even where findings of fact and conclusions of law are required to be made by a trial court that the circumstance that findings of fact are inserted under the head of "conclusions of law", does not in any wise affect their validity or prevent all of such facts so found from being available to support the judgment.

O'Reilly v. Campbell, 116 U. S. 418, 420;

Hayne on New Trials, 242;

McCarthy v. Brown, 113 Cal. 15, 16.

In O'Reilly v. Campbell, 116 U. S. 418, 420, which was a case brought on appeal from the Supreme Court of Utah Territory, the court said:

> "As to the findings, it is true they are not drawn with skill or precision; they are loose and somewhat confused. Facts and conclusions of law are sometimes mingled together contrary to the direction of the statute, creating the impression that the findings were prepared under the pressure of other duties, and did not receive the necessary care and attention. But findings are not to be construed with the strictness of special pleadings. It is sufficient if from them all, taken together with pleadings, we can see

> enough upon a fair construction to justify the judgment of the court, notwithstanding their want of precision and the occasional intermixture of matters of fact and conclusions of law. Defects of form should be called to the attention of the trial court by the objecting party, and the requisite correction of the findings would seldom be denied."

In Morgan v. Eggers, 127 U. S. 66, which was a case on error, to the Supreme Court of Indiana, the court said:

> "The order of January 20, 1883, embraces both a finding and judgment. But they are not for that reason nullities. (O'Reilly v. Campbell, 116 U. S. 418, 420.) * * * As there was no special finding of facts bearing upon the question of title, we must assume that the evidence authorized the finding as to the particular premises awarded to the plaintiffs."

POINTS AND AUTHORITIES.

FIRST POINT.

The Circuit Court had jurisdiction of the parties defendant and of the cause.

(A) Right to object waived by general appearance.

The appellants make the following assignment of error:

"Said Circuit Court was without jurisdiction as constituted and acting herein, in and during the proceedings in this case to hear and determine said cause." [R. 1083.]

Also as follows:

"The court erred in overruling the demurrer of these

defendants to the petition and complaint herein of the above named complainant." [R. 1084.]

The defendants, Atchison, Topeka and Santa Fe Railway Company, Santa Fe Pacific Railway Company and Southern California Railway Company, appeared generally in the cause and in the Circuit Court and filed a general demurrer for want of equity, and also for want of proper parties defendant to the bill. [R. 87, 88.]

The defendant, Southern Pacific Company, also entered a general appearance in the Circuit Court and in the cause, and also filed a general demurrer to the bill of complaint for want of equity. [R. 89, 90.]

None of the defendants appeared specially to raise any question as to the jurisdiction of the Circuit Court, *but all of them appeared generally*, and if by the assignments of error now made the defendants or any of them contend that the court was without jurisdiction of the defendants by reason of the places of residence of the defendants, or either of them, we submit that the right to object to the jurisdiction has been waived by such voluntary appearance.

The defendants also appearing generally, filed their answers to the merits without objecting to the jurisdiction. [R. 91, 101.]

Having so appeared and demurred and answered generally, we submit that defendants have *waived* all right to object to the jurisdiction of the persons of the defendants or to the forum, and that such objections cannot be made now.

St. Louis Railway v. MacBride, 141 U. S. 127;

Texas & Pacific Railway v. Cox, 145 U. S. 593, 603;

Central Trust Co. v. McGeorge, 151 U. S. 129;
Interior Construction Co. v. Gibney, 160 U. S. 217.

(B) Bill of complaint does not show others to be necessary or indispensable parties.

The Atchison, Topeka and Santa Fe Railway Company, Santa Fe Railway Company and Southern California Railway Company, as before stated, demurred to the bill upon the ground that the bill showed that there were other necessary parties defendant to the bill, who were not joined. [R. 87, 88.]

The Southern Pacific Company did not file a demurrer upon the ground of want of necessary parties defendant. [R. 89, 90.]

None of the defendants filed any plea or answer to the jurisdiction on account of want of necessary parties defendant.

As we understand the contentions of counsel for the Atchison Railroad, the point is attempted to be made that the routing rule and practice of the defendants comprising the Southern Pacific system and the Atchison system, which the said defendants were required by the order of the Commission to cease and desist from enforcing, was a regulation which was not only a rule and practice agreed to and enforced *by defendants* but was carried into the joint tariff, filed by the said defendants and numerous eastern and *Canadian* lines of railway with the Interstate Commerce Commission, and that the bill of complaint with the annexed exhibits, including the report of the Interstate Commerce Commission, shows that these numerous eastern and Canadian lines of rail-

way were parties to that joint tariff, and that consequently, they are necessary parties defendant to this cause.

We submit in answer to this contention, that there is nothing in or about the bill of complaint which shows that any other railroad company was complained of before the Commission as enforcing the routing rule, or practice, and that the bill does not show that any other railroad is now enforcing or ever has enforced, the said routing rule or practice, but on the contrary, does show that this routing rule, or practice, was enforced at the instigation of and solely by the Southern Pacific system and the Atchison system, parties to the present cause.

(C) Objection to want of other parties waived by failure to plead their names and show necessity of joining.

The order of the Commission required these two systems of railroad, they being competing lines, to cease and desist from that rule, or practice, and the order of the Commission was not directed against any other person, or corporation.

The report of the Interstate Commerce Commission, annexed to the bill, contains the following statement:

> "At the terminals mentioned (defendants' terminals) and at numerous junction points upon their lines, the defendants' systems connect with other carriers and form through connecting routes for the transportation of oranges and lemons and other citrus fruits from all shipping points in Southern California to practically all consuming markets in the United States. * * *
>
> "The defendant carriers have in effect a common

> tariff on citrus fruits from Southern California shipping points to the Missouri river and points east thereof. This joint tariff fixes a single or blanket rate of $1.25 per one hundred pounds to practically all points on and east of the Missouri river and names 183 participating roads which are classified in the tariff, as Western Roads, New England Roads and roads in trunk line and central freight association territories. 31 carriers in southeastern common point territory are also named with the following note: 'For application of rates to southeastern common points, see page 6 of east bound tariff No. 3-6." [R. 58.]

This finding of the Commission shows that there are in all, besides the parties defendant to this cause, being the Southern Pacific and Atchison systems, 214 railroad companies connecting directly or indirectly with the systems of the defendants, which are parties to the so-called joint tariff.

The bill of complaint does not contain a list of these eastern lines, parties to such joint tariff with the names of the railroads participating therein. [R. 8.]

There was nothing appearing upon the face of the bill to show that these eastern and Canadian railroads were indispensable parties to the injunction sought against the Atchison and Southern Pacific systems, nor did it appear that they were necessary parties within the ordinary meaning of that term, nor, even, that they were proper parties, for the reason that no relief was sought as against them, nor were they directing or controlling the routing of citrus fruits contrary to the direction of shippers.

We understand that the practice is well settled, that unless such non-joinder of indispensable parties plainly

appears upon the face of the bill, that such defect can only be raised by plea or answer, *pointing out and naming the persons who ought to be made parties and giving the reasons therefor.*

Carey v. Brown, 92 U. S. 171, 173;

Florence Machine Co. v. Singer, 8 Blatch. 113, Fed. Cases No. 4881;

Sheffield v. Newman, 77 Fed. 787-791 (C. C. A.)

Equity Rules 52, 53.

(D) Discretion of court to dispense with parties out of jurisdiction.

Even if these 214 eastern railroads would ordinarily be necessary parties defendant, which, however, is not conceded, there was discretion in the court below to dispense with them, they not being within the jurisdiction.

Upon the demurrers to the bill for want of jurisdiction, the necessity of such parties must appear upon the face of the bill.

It does not appear upon the face of the bill that any of those 214 railroad companies are residents of this judicial district, or that either of them has its principal place of business in this district, but being connecting lines of these defendants the inference is that they are situated in other states or territories.

It does not appear on the face of the bill or by the testimony that either of said connecting railroads has violated *within this district* the order of the Interstate Commerce Commission. [See first clause, Sec. 16 Interstate Commerce Act.]

It therefore appears that all of those railroads were beyond the jurisdiction of the Circuit Court.

The trans-continental citrus tariff referred to in the report of the Commission, and which is in evidence in this case [R. 456-517], contains the names of the railroads, and describes the territory within which said railroads are situated.

This tariff, at pages 516, 517, includes various points and places in *eastern Canada.*

Other parts of this tariff relate to various states within the United States situated south of Canada and west of the Atlantic Ocean.

The tariff at page 470 of the Record, names the "Grand Trunk Railway" as one of the parties, and at page 471 names the "Canadian Pacific Railway", and the "Clyde Steamship Line".

In other words, the so-called joint tariff names numerous railroads in Canada and foreign steamship lines and territory in Canada and in the eastern states as being embraced within the so-called joint tariff.

The contention of appellants' counsel is that the Interstate Commerce Commission could not investigate nor the Circuit Court entertain a suit to enjoin the defendants in this cause from committing discrimination, and from violating the law without performing the impossible feat of bringing before such tribunals corporations and railroad companies organized under the laws of foreign nations and doing business in Canada, and being wholly outside of the jurisdiction of the United States.

To state the appellants' contention is to at once demonstrate its absurdity.

It is provided by Equity Rule 47, which is based upon U. S. Revised Statute, section 737, as follows:

> "In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, * * * the court may in their discretion proceed in the cause without making such persons parties, and in such cases the decree shall be without prejudice to the rights of the absent parties."

The Circuit Court did in its discretion proceed in the cause without making such persons parties, as it had a right to do.

Inbusch v. Farwell, 1 Black 566, 571, 573;
Payne v. Hook, 7 Wall. 425, 431;
Fisher v. Shropshire, 147 U. S. 133, 145;
Story's Eq. Pl., Sec. 87.

(E) Where parties are numerous the court may dispense with them where represented.

Counsel for appellants contend that besides the Southern Pacific system and the Atchison system, including its constituent corporations, that these eastern and Canadian 214 railroad corporations ought to have been made parties to this suit.

The statement of the proposition and the number demonstrates its impracticability. The Circuit Court could not within the span of an ordinary life, have disposed of the motions, demurrers, answers, depositions and other usual proceedings of 214 railroad corporations in a single suit. Their very numerousness would operate to deny justice, especially in a matter pertaining to transportation and of the rights of the public connected therewith.

Railroad corporations act decisively and quickly through their executive officers in all matters pertaining to transportation, both in matters where they violate the law, as well as in lawful things, and if the United States government cannot secure an enforcement of the law against one group of corporations, without the inevitable delays, which would result from bringing in all the railroads in the country, and also foreign carriers, it would, indeed, be impotent.

Equity Rule No. 48 provides, as follows:

> "Where the parties on either side are very numerous, and cannot without manifest inconvenience and oppressive delays in the suit be all brought before it, the court in its discretion may dispense with making all of them parties and may proceed in the suit having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it, but in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties."

The Circuit Court in the case below did *in its discretion* proceed in the suit without bringing in all of the parties to the so-called joint tariff.

The Southern Pacific Company controlling and operating numerous lines, embraced in that system, and the Atchison, Topeka & Santa Fe Railroad Company, the Southern California Railway Company and the Santa Fe Pacific Railroad Company, were all parties to the so-called joint tariff, or Transcontinental Freight Bureau, and the defendants originated, developed and carried into effect the scheme in and by which the Southern Pacific system and the Atchison system were to control the routing of citrus fruit in order to work a pool and division

of business and freights, and the court below in its discretion doubtless considered that these four corporations embracing the two western systems, sufficiently represented the other members of the joint tariff, or freight association. For this reason alone it was proper to dispense with the eastern and Canadian railroad lines.

Rules in Equity No. 48;
Story's Eq. Pl., Sections 95, 97, 118;
U. S. v. Southern Pacific Railroad, 117 Fed. 544, 133 Fed. 651;
Davis v. Gray, 16 Wall. 203, 232.

The court will also observe by the thorough answers prepared in the cases and testimony taken on behalf of the defendants, that they fully contested every issue, not only for themselves, but for the benefit of all members of the freight association of which they were members.

(F) Wrong doer cannot defend on ground that another is not prosecuted.

The acts of the defendants in violating and refusing to obey the order of the Interstate Commerce Commission and in persisting in the routing rule or practice, in the view of the Circuit Court and in the opinion of the Commission, were illegal and tortious and violative of the Interstate Commerce Act.

There is a well settled principle which we invoke, that where it is sought to enjoin parties against the commission of a *tortious* act, or to recover damages for a *tortious* act, that it is no defense to say that other parties in-

terested with them, or joined in such wrongful acts, are not joined as parties defendant.

Cooley on Torts, 2d ed. p. 153;

Texas Pac. Rd. v. I. C. C., 162 U. S. 197, 205;

affirming I. C. C. v. Texas Pac. Rd., 52 Fed. 188;

Hawes on Parties to Actions, Section 28a;

Vol. 15, Enc. P. & P. 557;

Florence Sewing Machine Co. v. Grover, 110 Mass 1, 12;

Wilkinson v. Parry, 4 Russells, Rep. Eng. Ch. 272, 274;

Attorney General v. Wilson, Craig & Phillips, Eng. Ch. Rep. 1, 28;

Smith v. Atchison Rd., 64 Fed. 1;

Peoples Telephone Co. v. East Tennessee Telephone Co., 103 Fed. 212 (C. C. A. 6th Circuit);

Delaware Railway Co. v. Frank, 110 Fed. 689;

St. Louis Railway v. Coolridge, 83 Southwestern 333 (Ga.);

Gulf Railroad v. Leatherwood, 69 Southwestern 119 (Tex.).

SECOND POINT.

The rule and practice of defendants reserving absolute control of routing as found by the commission, is, as matter of law, in violation of section six of the commerce act, providing for joint tariffs over connecting railroads showing "continuous lines of routes" and prohibiting a greater charge than tariff rates for shipments over such lines.

The defendants and their connecting carriers filed their joint tariff for through rates and fixed the tariff on citrus fruit at $1.25 per hundred, claiming the right in such tariff to arbitrarily close any line of route to any shipper, or withdraw any line one day and restore it the next, at the absolute dictation of the initial carrier, and in all cases where a shipper insisted upon directing the route the carriers applied local rates greatly exceeding the joint tariff rate to such shipments.

It is clearly provided in section 6 of the Commerce Act, what shall be shown upon joint tariffs and among other things it is provided as follows:

> "And in cases where passengers and freight pass over continuous lines or routes, operated by more than one common carrier, and the several common carriers operating such lines or routes, establish joint tariffs of rates, or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also in like manner be filed with said Commission."

It is also provided in section 6 as follows:

> "No advance shall be made in joint rates, fares and charges, shown upon joint tariffs, except after ten days notice to the Commission, which shall plainly state the changes proposed to be made in the

schedule then in force, and the time when the increased rates, fares or charges will go into effect."

It is further provided by the same section as follows:

"It shall be unlawful for any common carrier party to any joint tariff to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property or for any services in connection therewith, between any points as to which a joint rate, fare or charge is named thereon, than is specified in the schedule filed with the Commission in force at the time."

It is plainly the theory and intent of the Commerce Act that when connecting carriers file joint tariffs they shall plainly designate *the lines of route* over which such tariffs apply, and that when the tariff rate is fixed and filed with the Commission, that *such lines of route* shown in the joint tariffs shall be open to public use *at the rates specified* and the act so provides in plain terms.

The purpose of these provisions is to prevent railways from opening routes and closing them and to prevent the carriers from changing the tariffs shown upon such routes, without due notice to the public and to the Commission, which body exercises a control over the matter of the reasonableness of the rates.

Now in the present case the Atchison system and the Southern Pacific system filed what they called their joint tariff before mentioned, showing the connecting lines to the east beyond their terminals.

On the Atchison road east of Chicago there were numerous lines to eastern states and the Atlantic seaboard, and likewise there were numerous lines of road connecting with the Southern Pacific system.

These lines of railroad were all designated and described in the tariff, and the tariff rate over all of them was fixed at $1.25 a hundred for citrus fruit, from Southern California to all points over any of those lines of railroad to points east of the Missouri river.

When, therefore, the defendant railroads designated these through lines to the east fixed the tariff rate at $1.25, a refusal on their part to accept freight over any of those lines at the specified rate was an open and wilful violation of the provisions of the commerce act above quoted.

It is well established that when connecting carriers enter into joint tariffs for freight over continuous lines, that such lines cannot be withdrawn from the public and from the control of the Commerce Commission. In Cincinnati and Texas Railway v. Interstate Commerce Commission, 162 U. S. 184, 192, the identical principal contended for by the defendants here, was set up by the Georgia Railroad Company, and the court said:

> "But when the Georgia Railroad Company enters into the carriage of foreign freight by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one state to another, and thus becomes amenable to the Federal act in respect to such interstate commerce. * * *
>
> "Having elected to enter into the carriage of interstate freights, and thus subjected itself to the control of the Commission, it would not be competent for the company to limit that control, in respect to foreign traffic, to certain points on its road and exclude other points."

In Minneapolis Railroad v. Minnesota, 186 U. S. 263, 264, the question presented was as to whether certain railroads in the state of Minnesota which had filed a joint tariff for commerce within the state, under the act of legislature of Minnesota, could voluntarily withdraw any line laid down in such joint tariff, and the court applying the principle declared in reference to joint rates for Interstate Commerce, under the act of Congress, said:

> "We are bound to recognize the fact that modern commerce is largely carried on over railways owned and operated by different companies; that Congress in passing the Interstate Commerce Act assumed the power to determine the reasonableness of joint tariffs as applied to connecting lines between the several states, Cincinnati &c. R. R. Co. v. Interstate Com. Com., 162 U. S. 184, and that, if the power of the state commission were limited to the tariffs of a single road, it would be wholly inefficacious in a large number, if not in a majority, of cases—in fact, that the whole purpose of the act might be defeated. The necessities of this case do not require us to determine whether connecting roads may be compelled to enter into contracts as between themselves and establish joint rates, but so far as applied to contracts already in existence we have no doubt of the power of the state to supervise and regulate them. Such a contract for a joint rate having been in existence when the order of the Commission was made, we do not think it was affected by the subsequent withdrawal of the Minneapolis and St. Louis Company."

The combined local rates over the connecting lines of railroad embraced in the joint tariff, greatly exceed the through rate. [R. 310.]

This is admitted in the answers. [R. 96, 102.]

It has been the practice of the defendants under their routing rule to charge local rates for shipping freight over the lines and to points named in the joint tariff wherever the shipper insisted on the right of routing or of selecting his own routes mentioned in such joint tariff. [R. 310.]

The defendant carriers refused to obey the order of the Commission to allow shippers to select any of the routes named in the joint tariff and applied the local rates as stated.

It is very plain that the denial of the *through routes* laid down in the joint tariff, at the whim or caprice of the initial carrier, or under an arrangement for division of business, is in effect an arbitrary withdrawal of such lines of route from the operations of the joint tariff, in violation of the provisions of the Commerce Act, as clearly stated in the decisions above mentioned.

It is equally clear that the refusal to transport freight *over the lines of route laid down in the joint tariff and at the rates therein prescribed* and the charge made over such routes and between the points named, in such joint tariff at the local rates, *far exceeding the joint rate,* is in violation of the seventh clause of section six of the Commerce Act.

THIRD POINT.

Routing rule violates Interstate Commerce Act and Sherman Anti-Trust Act forbidding pools and combinations in restraint of commerce.

The routing rule or practice devised and carried into effect by the Atchison Company and the Southern Pacific Company, by which they assume and exercise the arbitrary authority of routing freight over connecting lines to the exclusion of lines established in the joint tariff for the purpose of destroying competition and working a freight pool and division of freights between competing lines and actually accomplishing that result, is in violation of section 5 of the Interstate Commerce Act, and also of section 1 of the Sherman Anti-Trust Act.

Section 5 of the Interstate Commerce Act provides as follows:

> "Sec. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freight of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense."

Section 1 of the act to protect trade and commerce against unlawful restraints and monopolies provides as follows:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in re-

straint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The provisions of section 5 of the Interstate Commerce Act and of section 7 of the Sherman Anti-Trust Act both relate to the regulation of interstate commerce a subject within the plenary power of congress under the constitution.

They both prohibit combinations and agreements between individuals or corporations which have for their object the stifling of competition and obstruction of interstate commerce by simultaneous action between competing lines.

Section 5 of the Interstate Commerce Act is expressly levelled against railroad corporations engaged in interstate commerce, while section 7 of the Sherman Anti-Trust Act includes all persons and it has been held to include railways engaged in interstate commerce.

United States v. Trans-Missouri Freight Association, 166 U. S. 290;
United States v. Joint Traffic Association, 171 U. S. 505, 578;
Addyston Pipe Company v. United States, 175 U. S. 211, 248;
Montague v. Lowry, 193 U. S. 38;
Swift & Company v. United States, 106 U. S. 375;
Interstate Commerce Commission v. Baird, 194 U. S. 25, 47.

These acts being *in pari materia* by a settled rule of construction are to be considered together and read as a single act, the latter being amendatory of the first.

Cheow Heong v. United States, 112 U. S. 536;
Chicago Railroad v. United States, 127 U. S. 406;
District of Columbia v. Hutton, 143 U. S. 18.

Routing Rule Violates Section 5 of Commerce Act.

However, if no effect can be given to the provisions of section 7 of the Sherman Anti-Trust Act in connection with the provisions of section 5 of the Commerce Act, they both relating to the suppression of combinations to destroy competition, it appears that the provisions of section 5 of the Interstate Commerce Act prohibit this pool and division of freight.

Section 5 of the Commerce Act plainly, and in the clearest English, appears to be directed against two things: (1) an agreement or combination for the pooling of freights of different and competing railroads; (2) forbidding an agreement or combination to divide between competing lines the net proceeds of the earnings of such railroads.

It is the agreement for the consummation of these things which the law prohibits and not the outward form by which they are done.

It is not to be supposed that the laws will be openly and notoriously violated, but, on the contrary, such violation is usually attempted to be accomplished by indirection.

Whatever the method employed, if the defendant railways—they being different and competing lines—have

actually accomplished or have agreed or combined to accomplish by the routing rule a pool of freights or a division of the aggregate or net proceeds of the earnings, they clearly have violated the statute.

The findings of the Commission and the testimony taken in the Circuit Court, including the testimony of officers of the defendants, show that by means of controlling the routing of freight in citrus fruit, these two systems—they being competing lines—have actually worked out not only a pool, *but also have accomplished a division of the earnings by means of a physicial division of the shipments of freight.*

The reasoning of Judge Wellborn, of the Circuit Court, is so clear and logical that the following excerpts are made from his opinion:

> "While it is unquestionably true, as contended by the defendants, that joint tariffs over continuous lines are purely matters of voluntary arrangement between the carriers themselves, about which they may specially contract, yet this power of contracting, of course, is subject to all the prohibitions of the Commerce Act, as well those against pooling as those against unjust charges and discriminations. Section 5 of the Commerce Act, above quoted, makes it unlawful for the common carriers therein mentioned to enter into any contract, agreement, or combination among themselves—first, for the pooling of freights of different and competing railroads; second, to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof. The analysis of said section contended for by the Atchison, Topeka & Santa Fe Railway Company is inadmissible. According to that contention, the second prohibition of said section is not against a contract to divide earnings, but

against the actual division of earnings. Such a construction is grammatically impossible. The predicate of the clause 'to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof,' is all of the section down to and including the word 'carriers' in the fourth line. To stop short of the word 'carriers', and attempt a connection with the words 'to divide', etc., renders the clause incomplete and meaningless. The section, to properly express the prohibition, or, indeed, to have any meaning whatever, must be read as follows:

" 'That it shall be unlawful for any common carrier or carriers * * * to enter into any contract, agreement or combination with any other common carrier or carriers to divide between them,' etc.

"Unless the two clauses are thus connected, the relative 'them' in the latter is without an intelligible antecedent. * * * *

"Another objection to the defendant's analysis is that it loses sight entirely of the obvious purpose of the section, namely the safe-guarding of competition." * * * *

(United States v. Freight Association, 166 U. S. 290.)

"The meaning which said defendant attaches to the word 'freights' is in my opinion also wrong * * * * The word 'freights' was not intended to include passenger traffc." * * *

"Again, passenger traffic is included in the prohibition against the conventional division of earnings; and, if the word 'freights' were given the meaning defendant claims for it, then the first prohibition of the section, the one against pooling freights, would be entirely useless, since its purpose would be fully accomplished by the prohibition against division of earnings. On the other hand, the pooling of freights, in the sense of distributing the commodities to be transported, among the various carriers who are to perform the service, is not reached by a prohibition against the division of earnings. * * *

"It should be borne in mind that railroads may

pool their freights—that is, the commodities they carry—in two ways: First, by distributing the commodities between themselves for carriage; second, by dividing among themselves their aggregate earnings on the commodities carried. Obviously a prohibition against division of earnings does not include the first class of freight pools, and this explains why section 5 of the Commerce Law (24 Stat. 380.. U. S. Comp. St. 1901, p. 3156), although adopting some of the features of section 2 of the original Reagan bill, as shown in defendants' brief omits the words 'or to pool the freights', which were contained in said section 2, and for the words 'by dividing', also contained in said section 2, substitutes the words 'or to divide', thus showing that it is the purpose of the commerce law to prohibit, not only earnings pools, but also traffic pools. * * * *

"The Century Dictionary, however, defines the word 'pool' thus:

" 'A combination intended by concert of action to make or control changes in market rates.'

"This general definition the same authority specially illustrates thus:

" '(b) A combination of the interests of several otherwise competing parties, such as rival transportation lines, in which all take common ground as regards the public, and distribute the profits of the business among themselves equally, or according to special agreement. In this sense pooling is a system of reconciling conflicting interests, and of obviating ruinous competition, by which the several competing parties or companies throw their revenue into one common fund, which is then divided or redistributed among the members of the pool on a basis of percentages or proportions previously agreed upon or determined by arbitration.'

"For judicial approval of this lexicographical exposition, see *In re* Pooling Freights, 115 Fed. 558.

"Obviously the general definition above quoted is broader than the special illustration, and I can conceive of no particular wherein the contract for routing by the initial carrier falls short of said definition.

Said contract shows upon its face a combination intended by concert of action to make and control changes in market rates, and, besides, defendants' own witnesses testify to such intention in unmistakable language. * * *

"Not only, however, is the routing rule a pooling arrangement within the letter of said section, but said rule is against the spirit of the Commerce Act. That act prohibits only pools of *competing railroads*, and the sole object of suppressing such pools was to protect the competing relation, and any and every arrangement or device intended to destroy, and which does destroy, that relation, whether expressly named in the act or not, contravenes its policy. Since defendants' plan to maintain their rates through the operation of the routing rule necessarily involved the destruction of competition, it is idle to say that that result was intended by them. The sole immediate aim of the routing rule was to put the shippers of citrus fruit in a position where their patronage could not possibly be competed for by defendants' eastern connections, and Mr. Morton himself explains the matter briefly, but with great clearness, in the following extracts already quoted from his testimony: [R. 1035-1039.]

132 Fed. 837, 838, 839, 840, 841.

Judge Speer in Tift v. Southern Railway Company, 138 Fed. 753, 761, said:

"This combination or concert of action on the part of the respondent railroads is plainly violative of that provision of the interstate commerce law which forbids pooling. This was enacted, among other things, for the purpose of securing competition. Pooling may be as well effected by a concert in fixing in advance the rates which in the aggregate would accumulate the earnings of naturally competing lines, as by depositing all of such earnings to a common account and distributing them afterwards. That such an association and concert of action between agents of naturally competing lines

is destructive of competition is equally unanswerable."

It is obvious that the purpose of section 5 of the Interstate Commerce Act was to prohibit combinations having for their object the stifling of competition, the restraint of commerce and artificial increase of rates by concert of action between competing lines.

Congress, therefore, has prohibited the "pooling of freights" and a "division of earnings" by competing railroads whatever the form or device may be to accomplish these results.

If a narrow and technical interpretation of these comprehensive laws were adopted, it would not be difficult for violators of the law to devise other modes of dividing earnings, which may not have been adopted or proposed, thereby greatly enlarging their powers and restricting the rights of the public.

Interstate Commerce Acts should be Liberally Construed to Protect Public.

The power of railways to operate interstate railroads and to fix schedules of rates is in pursuance of public franchises granted by and eminating from the United States.

Those franchises and powers eminate from the nation and cannot be exercised at all without authority from Congress, nor can they be burdened by the states.

California v. Pacific Railroad, 127 U. S. 1, 39;
Luxton v. North River Bridge Co., 153 U. S. 525, 533;
Illinois Rd. v. Illinois, 163 U. S. 142;
Hanley v. Kansas, 187 U. S. 617, 619.

In California v. Pacific Railroad, *supra*, the court said:

> "No private person can establish a public highway or a public ferry or railroad or change tolls for the use of the same without authority from the legislature direct or derived. These are franchises."

The Interstate Commerce Acts were passed to regulate the rights of the public and to prevent public wrongs by common carriers engaged in interstate commerce. To construe these acts strictly would operate to curtail and to deny the public rights and to enlarge by implication the corporate franchises and powers of the railways.

We think it is a settled rule of construction that statutes intended to prevent fraud and wrong, although containing penal provisions, are to be construed liberally in favor of the public.

Taylor v. United States, 3 How. 197, 210;
Smythe v. Fiske, 23 Wall. 374, 380;
United States v. Stowell, 133 U. S. 1, 12.

It is also well settled that franchises, privileges and powers, claimed under authority of the state or nation, are to be ~~strictly~~ construed in favor of the public and against the grantee, and that nothing will be deemed to have been passed or taken against the public upon any implication, and that all doubts and ambiguities are to be construed favorably to the government.

Dubuque & Pacific Railroad v. Litchfield, 23 How 83, 88;
Leavenworth, Lawrence &c., Railroad v. United States, 92 U. S. 733, 740;
Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 562;
Holyoke Co. v. Lyman, 15 Wall. 500, 512;
Slidell v. Grandjean, 111 U. S. 412, 437;
Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 696.

Hence it follows that the interpretation of these Interstate Commerce Statutes acts in the nature of a balance. Wherever a strict interpretation is given which operates to deny to the public rights or protection in the matter of rates or of transportation over interstate commerce roads, or to deny to the Interstate Commerce Commission, or other public authority, the regulation of such matters, that very construction or interpretation operates to enlarge *by implication* the powers and franchises of the interstate commerce railways.

Whatever is taken away from the one side must necessarily be given to the other; and we therefore submit that under the settled rules of construction of such acts they should be construed liberally to protect the public interests and the public authority, and in cases of ambiguity or doubt to restrict the franchises and powers claimed against the government.

FOURTH POINT.

Routing rule obstructs commerce and is discriminative.

The routing rule or practice in its operations and effect is discriminative as shown by the findings of the commission and evidence taken before the Commission and in the Circuit Court heretofore reviewed in the following respects:

(1) In denying shippers the right of transportation over through routes designated and laid down in the joint tariffs filed by the defendants with the Interstate Commerce Commission at the through routes established in such joint tariffs; (2) in refusing to shippers control

over their shipments; (3) in interfering with diversions and sale of fruit, the practice of diverting being one of universal custom; (4) in preventing shippers from having knowledge of routes; (5) in wresting control of the shipments from the owner, which he needs for prudent protection of his own property; (6) in denying shippers the shortest and best routes; (7) in resulting in delays in transit; (8) in resulting in shipments over bad lines affected by weather; (9) and in destroying competition.

In the above respects the routing rule or practice complained of subjects shippers of citrus fruit and the locality of Southern California and the citrus fruit traffic to undue and unreasonable prejudice and disadvantage in violation of the first clause of section 3 of the Interstate Commerce Act.

That provision is as follows:

> "Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The Interstate Commerce Commission, after stating all the facts in detail, found in its conclusions as follows:

> "Our conclusion is that the practice of the defendant carriers in denying to the shippers the use of their transportation facilities by the established routes is in violation of the statute, and, in its application by the defendants to the traffic in quesion, subjects the owners and shippers thereof to undue, unjust and unreasonable prejudice and disadvant-

age, and gives to the carriers an undue and unreasonable preference and advantage." [R. 77.]

The bill of complaint alleged that the said routing rule r practice is in violation of the act to regulate commerce and is discriminative in the following language:

> "And complainant charges that the said rule of the defendants and practice thereunder, which they are required by said order, Exhibit "H" hereto, to cease and desist from enforcing and maintaining, are in violation of the Act to Regulate Commerce, in that, among other things, said rule and practice subject shippers of oranges, lemons, and other citrus fruits, from points in Southern California to points on and east of Missouri river and to other destinations, to an undue or unreasonable prejudice or disadvantage, and also in that it subjects the traffic in oranges, lemons and other citrus fruits, between said points, to an undue or unreasonable prejudice or disadvantage and gives to said defendants an undue or unreasonable preference or advantage."
>
> [R. 11, 12.]

The Circuit Court expressly found that all of the allegations of the bill of complaint were true. [R. 112.]

The testimony heretofore reviewed, which was taken in the Circuit Court, overwhelmingly established that this allegation of the bill of complaint and finding of the Commission was true.

It is well settled that where two lower courts have passed upon and concurred in the facts upon which the decree is based, the Supreme Court, upon appeal, will consider those facts as established.

Dravo v. Fabel, 132 U. S. 487;
Stuart v. Hayden, 169 U. S. 1, and
Shappirio v. Goldberg, 192 U. S. 232, 240.

This court ought therefore to consider the facts found by the Commission, and reaffirmed by the Circuit Court, to be definitely established.

FIFTH POINT.

Bill of complaint shows discrimination by defendant carriers forbidden by supplementary act of February 19, 1903. This suit is maintainable independently of any report by commission.

The bill of complaint contains the following averment:

> "And complainant charges that the said rule of the defendants and practice thereunder, which they are required by said order, exhibit H hereto, to cease and desist from enforcing and maintaining, are in violation of the act to regulate commerce, in that, among other things, said rule and practice subject shippers of oranges, lemons, and other citrus fruits from points in Southern California to points on and east of the Missouri river, and to other destinations, to an undue or unreasonable prejudice or disadvantage, and, also, in that it subjects the traffic in oranges, lemons, and other citrus fruits between said points to an undue or unreasonable prejudice or disadvantage, and gives the said defendants an undue or unreasonable preference or advantage." [R. 11, 12.]

The Circuit Court found this allegation to be true. [R. 112.]

The act of Congress "to further regulate commerce with foreign nations and among the states", approved February 19, 1903, provides, by section 3, as follows:

> "That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier * * * is committing any

> discriminations forbidden by law, a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or state, it may be dealt with, inquired of, tried, and determined in either such judicial district or state, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity."

By section 4 of the act it is provided as to suits then pending that "such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law *and as modified by the provisions of this act.*"

In Missouri Pacific Railway v. United States, 189 U. S., 274, 284, the court held that the provisions of the above act of 1903 were applicable to cases pending at the time of its passage, and that the effect of such legislation was not only to authorize the Interstate Commerce Commission to commence suits to enforce the provisions of the Interstate Commerce Act as to any discrimination forbidden by law without having made any findings of fact, or report, but also that the provisions of the said act of 1903 were intended to and did include pending litigations and suits which had been commenced without any findings of fact or report of the Commission.

The present case was pending when the act of February 19, 1903, was passed, but the answers of the defendants were not filed until after the passage of that act [R. 101, 108], and all of the testimony was taken, ar-

guments had, and final decree entered after the passage of that act.

We submit that the allegations of the bill of complaint above set forth, charging undue and unreasonable prejudice and disadvantage as to shippers of citrus fruit, and as to the orange traffic, as to which averment no special demurrer was filed, but upon which issue was joined by the answers [R. 92, 101], and the testimony heretofore reviewed supporting such averments of the bill, present a case within the purview of the act of 1903 independent of any findings of fact or report of the Commission.

The decree of the Circuit Court should be affirmed.

Respectfully submitted,

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For Appellee.